

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-214946

DATE: May 22, 1984

MATTER OF: Cal Pacific Fabricating, Inc.

DIGEST:

1. GAO generally will not review a Small Business Administration (SBA) decision to issue or not to issue a certificate of competency, since the Small Business Act gives SBA conclusive authority to determine all elements of small business responsibility. The only exceptions are when there is a showing of possible fraud or bad faith on the part of contracting officials or when it is alleged that SBA did not follow its own regulations or did not consider material information in denying the certificate of competency.
2. To establish bad faith, the courts and GAO require presentation of virtually irrefutable proof that government officials had a "specific and malicious intent" to injure the protester. Neither communications between contracting officials and the Small Business Administration (SBA) nor the fact that SBA headquarters does not concur with the proposed affirmative determination of a regional office meets this criterion.
3. Contracting officer is only required to withhold award for up to 15 working days following receipt by SBA of a nonresponsibility determination, so that award approximately 6 months after preaward survey in which questions were raised concerning protester's financial resources is not improper.

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4. There is no requirement that an offeror be provided an opportunity to submit information other than that in its initial application for a certificate of competency. To avail themselves of the protections provided by statute and regulation against possible unreasonable nonresponsibility determinations, small business concerns must file complete and acceptable applications with the Small Business Administration.
5. Unsuccessful applicant for a certificate of competency may request a meeting with the Small Business Administration to discuss the matter. Such meetings, however, are for the sole purpose of enabling the applicant to improve or correct deficiencies, and do not provide a basis for reopening the procurement for which the certificate has been denied.

Cal Pacific Fabricating, Inc. protests the award of a contract for construction of expandable containers under a request for proposals issued by Warner Robins Air Logistics Center, Georgia. The firm alleges that the contracting officer improperly influenced the Small Business Administration and caused it to deny a certificate of competency to Cal Pacific.

We dismiss the protest.

The solicitation in question, No. FD0260-82-53401, was issued in July 1982; award was made to NORDAM on March 23, 1984. During the interim, Cal Pacific, the apparent low offeror, made extended but unsuccessful efforts to establish that it was financially able to perform the contract.

In September 1983, shortly after submission of best and final offers, Cal Pacific was the subject of a preaward survey. Although the firm was approved in other areas, because of questions as to its finances, the Air Force referred the matter to the SBA under the certificate of competency procedures.

Cal Pacific alleges that a telephone call from the contracting officer caused SBA's San Francisco Regional Office to deny the certificate of competency on December 8, 1983, although on that same date Cal Pacific had obtained a requested letter guaranteeing a \$3.5 million loan for start-up costs. After Cal Pacific contacted Air Force officials, SBA representatives, and congressional staff members, the SBA reopened its file and, according to the protester, by late December both the Los Angeles and San Francisco offices of SBA had made affirmative recommendations. In addition, Cal Pacific states, it had been virtually assured by SBA's Associate Deputy Administrator in Washington, D.C. that approval would be forthcoming. On January 10, 1984, however, SBA denied the certificate of competency.

Despite subsequent efforts by Cal Pacific, which apparently had been told by SBA that the matter would again be considered if the Air Force resubmitted the file, the contracting officer refused to do so. Rather, he proceeded with award to an offeror whose price was approximately \$8 million more than Cal Pacific's.

Cal Pacific's protest may be summarized as follows: that the contracting officer improperly communicated with various SBA officials, urging denial of the certificate of competency and that such intentional interference in SBA's decisionmaking process constitutes fraud or bad faith.

Our Office generally will not review an SBA decision to issue or not to issue a certificate of competency. The Small Business Act, 15 U.S.C. § 637(b)(7)(A) (1982), gives SBA conclusive authority to determine all elements of small business responsibility. Only when there is a showing of possible fraud or bad faith on the part of contracting officials, or when it is alleged that SBA did not follow its own regulations or did not consider material information in reaching a decision, will we review it. See Skellens Enterprises, 61 Comp. Gen. 142 (1981), 81-2 CPD ¶ 472; J. Baranello and Sons, 58 Comp. Gen. 509 (1979), 79-1 CPD ¶ 322. In our opinion, nothing that Cal Pacific has alleged falls within these exceptions.

First, to establish bad faith, the courts and our Office require the presentation of virtually irrefutable proof that government officials had a "specific and malicious intent" to injure the protester. Marine Industries Northwest, Inc.; Marine Power and Equipment Co., 62 Comp. Gen. 205 (1983), 83-1 CPD ¶ 159. We have held that communications between contracting officials and the SBA do not constitute evidence of bad faith, since the Defense Acquisition Regulation (DAR) clearly contemplates such communications. Specifically, the regulations require procuring activities to maintain close liaison with SBA, to endeavor to reach agreement with SBA, and to provide SBA with their views, including copies of preaward surveys and other documents supporting a contracting officer's non-responsibility determination. See Tri-Marine Industries, Inc., B-210652.3, May 12, 1983, 83-1 CPD ¶ 503, citing DAR § 1-705.4(c)(3)(a) and (d).

Here, the evidence that Cal Pacific has provided as to the content of conversations and letters between the contracting officer and the SBA is purely hearsay. In any event, the fact that the contracting officer communicated with SBA, expressing negative views about Cal Pacific, and that SBA ultimately adopted his views in refusing to issue the certificate of competency does not, in our opinion, establish bad faith.

Nor is the fact that SBA did not follow the affirmative recommendations of its Los Angeles and San Francisco offices evidence of bad faith. SBA regulations require referral of a regional office's recommendation for issuance of a certificate of competency whenever a procurement exceeds \$500,000. 13 C.F.R. § 125.5(c) (1983). This procedure, by its very existence, implies that a certain number of recommendations will not be accepted. Tri-Marine Industries, Inc., *supra*. See also DAR § 1-705.4(f) (also recognizing that SBA headquarters may not concur with the proposed affirmative determination of a field office).

Thus, the denial of a certificate of competency to Cal Pacific, despite the fact that the San Francisco Regional Office recommended that one should be issued, was the type of business judgment that SBA headquarters officials are on occasion expected to make.

Second, Cal Pacific has not shown that SBA technical staff members who reviewed its application for the certificate of competency, while considering the views of the contracting officer, did not also consider the positive findings in the preaward survey report or the letter guaranteeing the loan for start-up costs. We therefore cannot conclude that SBA failed to consider material information in denying the certificate of competency.

Finally, we do not find that either the contracting officer or the SBA failed to follow applicable regulations in the referral process. The contracting officer is only required to withhold award for up to 15 working days following receipt by the SBA of a nonresponsibility determination. 13 C.F.R. § 125.5(d); DAR § 1-705.4(c); Kan-Du Tool & Instrument Corp., B-210819, June 21, 1983, 83-2 CPD ¶ 12. Here, the contracting officer withheld award for approximately 6 months following the preaward survey while Cal Pacific attempted to resolve SBA's questions concerning its financial resources.

Although Cal Pacific appears to believe it should have been given further opportunities to qualify for this procurement, there is no requirement that offerors be permitted to submit information other than that in their initial applications for a certificate of competency. Tri Marine Industries, *supra*. Rather, it is the responsibility of small business concerns to file complete and acceptable applications with the SBA in order to avail themselves of the protection provided by statute and regulation against possible unreasonable determinations of nonresponsibility by contracting officials. Introl Corp., B-213555, April 17, 1984, 84-1 CPD ¶ ____.

As an unsuccessful applicant for a certificate of competency, Cal Pacific may request a meeting with SBA regional personnel to discuss the matter. Under the regulations, however, such meetings are for the "sole purpose of enabling the applicant to improve or correct deficiencies and will not constitute a basis for reopening the case in which the certificate is denied." 13 C.F.R. § 125.5(g).

The protest is dismissed.

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